In the High Court of Judicature at Madras

Dated: 02/08/2004

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S. SARDAR ZACKRIA HUSSAIN

H.C.P.No.293 of 2004

Uma Shankar Narayanan .. Petitioner

-Vs-

1. The State of Tamil Nadu
rep. by its Secretary of State
Public (SC) Department
Fort St. George, Chennai 600 009.

2. Union of India rep. by
the Secretary to Government
Ministry of Finance,
Department of Revenue
Central Economic Intelligence Bureau
Janpath Bhawan "B" Wing
New Delhi. .. Respondents

Petition filed under Article 226 of the Constitution of India
praying for issuance of writ of Habeas corpus as stated therein.

For petitioner : Mr. B. Kumar,Sr.Counsel
for Mr. R. Loganathan

For 1st respondent: Mr. Abudukumar Rajaratinam
Government Advocate (Crl.)

For 2nd respondent: Ms. Vanathi Srinivasan,ACGSC.

:ORDER

(Order of the Court was made by P. SATHASIVAM,J.,)

The friend of the detenu by name Wira Kumaran, an Indonesian citizen challenges his detention order dated 30.01.2004 passed by the Government of Tamil Nadu i.e., first respondent, detaining him in Central Prison, Chennai under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short COFEPOSA Act) (Central Act 52 of 1974).

2. The case of the petitioner as set out in the affidavit is briefly stated hereunder:
The said Wira Kumaran hereinafter referred to as detenue is a citizen of Indonesia. He had come to India on 05.12.2003 to place orders / purchase Indian goods. He does not know to read or write either Tamil or English. He has a shop by name Toko Kasthuri at Medan in Sumathra, Indonesia. He is a bona fide trader and selling mostly Indian goods catering to the needs of the people of Indian origin living in Sumathra, Indonesia. He had come to India the first and only time on 05.12.2003. The detenu along with his friend by name Karpiya Ambiga landed at Chennai. He had with him 20,000 US $, all in 100 Dollar bills, of which 10,000 US $ belonged to Karpiya Ambiga and 10,000 US $ belonged to the detenu. The said 20,000 US $ had been lawfully obtained in the name of the detenu at Medan Indonesia from an authorised money changer, namely IPT Delimegah Valutindo. Because of his unfamiliarity with Customs laws in India and did know how to read Tamil or English, they did not make a declaration when they brought the same into India. Both of them were put up in Hotel Rivera at Poonamallee High Road. While staying at Hotel, for safety purpose they entrusted 20,000 US $ with one Sugumaran, who is an exporter of Indian products. At the time of going to Indonesia, the cover containing 20,000 US $ were entrusted back to the detenu. He had kept the said money in the cover, which he had kept in his trouser pocket. After obtaining boarding pass and immigration, he was frisked by the security to whom he had showed that he had the packet with his currencies. On seeing the cover, 5 / 6 Customs Officers covered around him and his checked in baggage were called; they were thoroughly searched. The detenu was also searched. Since the detenu does not know to write Tamil or English, the Officers wrote down the whole statement in English and asked the detenu to keep the same. This the detenue could do so because the script in the Indonesian language and the English language are one and the same. He explained that he did not acquire the foreign exchange by illegally purchasing the same in India. He did not know the procedure to the effect that foreigner must declare currency brought by him and keep with him, the declaration form counter signed by the Customs Authorities at the time of departure from India. The discovery was accidental. The authorities have taken into consideration extraneous factors while detaining the detenu under the COFEPOSA Act. He cannot be detained under preventive detention Act.

3. The Joint Secretary to Government, Public (Law & Order) Department, Chennai 9 has filed a counter affidavit on behalf of the first respondent, disputing various averments made by the petitioner. It is stated that the detenu had attempted to smuggle the foreign currencies out of the country by way of non / mis-declaration and thus he had committed an offence under Section 135 of Customs Act, 1962. The detenu was in possession of 20,000 US $ and the same were seized only from him in the presence of two independent witnesses. He had not produced any evidence that 10,000 US $ belonged to Karpiya Ambiga and the same is an after thought. When the detenu had performed international journey from one country to another, i.e., from Indonesia to India through Malaysia, he should have the familiarity of customs procedure of the relevant countries or he should have approached the Customs Officers at the Chennai Airport and on his arrival about his possession of foreign currencies and nothing prevented him to do so. Ignorance of law is

not an excuse. The detenu had not produced any concrete evidence that he had brought 20,000 US $ on his arrival at Chennai airport on 16.12.2003 through Malaysia. Money changer certificate also cannot prove that he had brought 20,000 US $ from Indonesia to Chennai without utilising it anywhere either at Indonesia or Malaysia. The detenu had not made true declaration and also not come forward to declare voluntarily. He could have declared that he was having 20,000 US $ at the first instance itself. The amount of 20,000 US $, which is equivalent to Indian Rs.9,13,917/- seized from the detenu is more than the monetary limit of Rs.5 lakhs for invoking the provisions of COFEPOSA Act against the detenu. Since the detenu had committed an offence under Section 135 of Customs Act, 1962 for the attempt of smuggling the above foreign currencies, the detention order was passed by the detaining authority against the detenu after consideration of all the facts of the case and after arriving to the subjective satisfaction of the detaining authority. The detention order is correct in law and there is no delay in considering the representation received on 25.02.2004.

4. Heard Mr. B. Kumar, learned senior counsel for the petitioner, Mr. Abudu Kumar Rajaratinam, learned Government Advocate (Criminal Side) for respondents 1 to 3 and Mrs. Vanathi Srinivasan for the second respondent.

5. "Smuggling" is defined in Section 2 (39) of the Customs Act, 196 2.

"Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under Section 111 or Section 113."

Section 135 of Customs Act, 1962 speaks about Evasion of duty or prohibitions.

"135.Evasion of duty or prohibitions-
[(1)] Without prejudice to any action that may be taken under this Act, if any person-
(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or
(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reasons to believe are liable to confiscation under section 111 ,
he shall be punishable, ..."

It is clear that if any person "knowingly" concerned in any fraudulent evasion or attempt at evasion of any duty chargeable or acquires possession or in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing etc., knowing that they are liable to confiscation under Section 111, he shall be punishable under the Customs Act, 1962.

Section 3(1) of COFEPOSA Act enables the concerned authority to make orders detaining certain person / persons, including a foreigner with a view to prevent him acting in any manner prejudicial to conservation or augmentation of foreign exchange or with a view to preventing him from -

"(i) smuggling goods, or
(ii) abetting the smuggling of goods, or
(iii) engaging in transporting or concealing or keeping smuggled goods, or
(iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or
(v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods,
it is necessary so to do, make an order directing that such person be detained."

In our case, the detenu was detained under the orders of the Public Department of State Government under Section 3(1)(i) of COFEPOSA Act.

6. Now, let us consider whether the detaining authority is justified in passing the detention order in the light of the above referred provisions. We have already referred to the fact that the detenu is an Indonesian. He came to India to place / purchase Indian goods, in order to sell the same in his country. At the time of interrogation, the detenu has made a statement in the following manner.

".... I have come to India for business purpose. This is for the first time coming to India. On arrival at Chennai Airport, I had 20,000 US $, which I have not declared to Customs Department at Chennai. .... "

Again, it is stated by the detenu that,

".... As I did not declare the said currency on my arrival and had also mis-declared at time of departure, the said Customs Officer seized the same under a mahazer for taking necessary action under Customs Act, 1962 read with Foreign Exchange Maintenance Act, 1999. .... "

Finally he made a humble statement stating that,
".... This is the first time I am coming to India, I am not aware of the Custom Laws, I may be excused for this. I have committed this offence without intention. "

The above referred statements were made by him on 16.12.2003 in the presence of two independent witnesses. The statements are also find place at page 39 to 43 of the book-let supplied to the detenu. Similar statements have been made by Karpiya Ambiga. It is clear from the above statements that the detenu, who is a citizen of Indonesia came to India for business purpose and brought 20,000 US $ in his pocket. It is also revealed that out of 20,000 US $, 10,000 US $ belonged to his friend Karpiya Ambiga. It is further revealed that he did not declare the said amount either at the time of arrival from Indonesia or at the time of departure.

7. It is settled law that the preventive detention is not a punitive act and it is not alternative to criminal trial under the law. It does not empower the authority to punish a person without trial. Its purpose is to prevent a person from indulging in activities, such as smuggling and / or such other anti social activities as provided under the Preventive Detention Law. The question therefore would be from the past conduct of the petitioner as set out in the grounds of detention or other circumstances, whether reasonable inference could be drawn that he is likely to repeat such acts in the future. In the case on hand it is revealed that the petitioner had not involved in any other case and he pleaded ignorance of Customs laws in our country. In such a circumstance, we are of the view that inference cannot be drawn that he was involved in smuggling activities or likely to indulge in such activities in future. It is totally unreasonable to arrive a conclusion that the detenu is likely to indulge in any such prejudicial activities. What is required to be seen is, as to whether on the materials placed on record, it could reasonably be said to indicate any organised act or manifestation of organised activity or give room for an inference that the detenu would continue to indulge in similar prejudicial activity warranting or necessitating the detention of the person to ensure that he does not indulge such activities in future. Though we are aware of the limitation in considering the challenge to an order of detention and the same cannot be considered as if on an appeal in reappraising the materials, yet it is open to the Courts to see whether there has been due and proper application of mind and that all the relevant and vital materials for the purpose have been noticed, adverted to and considered. In this regard, it is useful to refer the judgment of the Supreme Court in the case of Chowdarapu Raghunandan vs. State of Tamil Nadu and others reported in JT 20 02 (3) SC 110. In para 13 their Lordships have held,

"13. .... It is also settled law that an order of preventive detention is founded on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of the surrounding circumstances. Such past conduct may consist of one single act or of a series of acts. .... "

8. A perusal of all the materials, particularly the statutory provisions referred to above, voluntary statement of the detenu and his friend Karipya Ambiga and other materials clearly show that the impugned order suffers the vice of total non-application of mind to a relevant and vital material touching question of the culpability as well as the necessity to order the detention of the detenu. Accordingly, the order of detention impugned in this petition is set aside; this petition is allowed and the detenu is directed to be set at liberty forthwith from the custody unless he is required in connection with any other case.

Index :Yes
Internet:Yes

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To
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2. The Secretary to Government
Union of India
Ministry of Finance,
Department of Revenue
Central Economic Intelligence Bureau
Janpath Bhawan "B" Wing
New Delhi.

3. The Superintendent
Central Prison,
Chennai.

4. The Joint Secretary to Government
Public (Law & Order)
Fort St. George, Chennai 600 009.

5. The Public Prosecutor
High Court, Madras.